The Honorable John H. Chun

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC., *et al*.

Defendants.

Case No. 2:23-cv-0932-JHC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL RULE 30(b)(6) DEPOSITION REGARDING THE FTC'S OFFICIAL, PUBLIC STATEMENTS ABOUT ROSCA

NOTE ON MOTION CALENDAR:
January 21, 2025

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The FTC has already provided Defendants 8.5 hours of Rule 30(b)(6) testimony on 20 wide-ranging topics, including the reasons why the FTC believes "the Prime Online Cancellation Flow does not provide a simple mechanism" to cancel Prime and why "the Prime Enrollment Flow does not obtain consumers' express informed consent." Nonetheless, Defendants insist they are entitled to more and now move to compel additional FTC testimony on subject matter irrelevant to any claim or defense in this litigation, and tellingly on which the Court has already ruled against them. *See* Dkt. #214 (Defendants' Motion to Compel Rule 30(b)(6) Deposition) (the "Motion").[1] In particular, Defendants seek testimony regarding "the FTC's public statements about ROSCA" made in the course of the Negative Option Rule rulemaking[2] as well as the extent to which requirements promulgated in the rulemaking are "inconsistent with or different from" the requirements the FTC has asserted under ROSCA in this litigation (collectively, the "Rulemaking Topics"). *See* Motion at 9-10. Critically, however, the Court has already held that both the Negative Option Rule rulemaking and the FTC's interpretation of ROSCA are irrelevant. *See* Dkt. #180 (Order Denying Defendants' Motion to Compel) at 11 (holding the FTC's "later rulemaking . . . is not at issue in this case"); *id.* at 12 ("[T]he FTC's interpretation of ROSCA is irrelevant to the Court's interpretation of the statute.").

Despite these clear holdings, or perhaps because of them, Defendants rehash four relevance arguments disguised as new issues. Each fails for the same reasons the Court previously found them irrelevant. *First*, Defendants assert the Rulemaking Topics are relevant to the FTC's allegations that Defendants violated ROSCA. This is nothing more than a request the

[1] Citations are to internal document pagination (not ECF header pagination), unless otherwise specified.

[2] This refers to the FTC's recent rulemaking to amend the "Rule Concerning Use of Prenotification Negative Option Plans" (*see* 89 Fed. Reg. 90476) (hereafter "Negative Option Rule" or "Rule").

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Court reconsider its prior rulings. *Cf. Crawford v. United States*, 2015 WL 1218479, at *2 (Fed. Cl. Mar. 13, 2015) ("A motion for reconsideration is not intended . . . to give an unhappy litigant an additional chance to sway the court.") (citation omitted). The FTC's statements about ROSCA are irrelevant to the Court's interpretation of the law.

Second, Defendants argue the FTC's statements about ROSCA are relevant to "impeach" the FTC's "positions in this case." However, as this Court has already recognized, Defendants cannot take deposition testimony regarding the FTC's statements about the law to "impeach" the FTC's legal positions. *See* Dkt. #180 at 5-6 (rejecting Defendants' request for discovery of "internal agency discussions" of ROSCA to "impeach" the "FTC's interpretation of ROSCA").

Third, Defendants assert the Rulemaking Topics are relevant to their civil penalties defense. However, the FTC's internal legal positions are irrelevant to whether Defendants had "actual knowledge" of their ROSCA violations because the contents of those positions were unknown to Defendants, and the rest of the world, at the time of Defendants' violative conduct. *See* Dkt. #180 at 8 (holding "internal agency interpretations" are irrelevant "unless the defendant was aware of those internal . . . interpretations at the time the rule was violated") (quoting *Wisconsin Bell, Inc.*, 2020 WL 13048895, at *2 (E.D. Wis. Oct. 29, 2020)).

Fourth, Defendants assert the Rulemaking Topics are relevant to their due process defenses. Critically, the Court already rejected Defendants' due process defenses. *See* Dkt. #165 (Order Denying Defendants' Motions to Dismiss) at 40-43; *see also id.* at 43 ("[T]his case does not upset settled expectations about what disclosures and cancellation processes are required for automatically renewing subscriptions."). Once again, Defendants' Motion is a thinly-veiled invitation for the Court to revisit its prior rulings. In any case, Defendants already had ample

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opportunity to take FTC testimony on noticed topics relating to their "fair notice" arguments. Defendants are not entitled to more.

The Motion to Compel should be denied.

BACKGROUND

On June 12, 2024, Defendants served a Rule 30(b)(6) deposition notice on the FTC. Defendants' notice, which contained 60 distinct deposition topics, impermissibly sought testimony on "every facet" of the litigation. *See* Nardini Decl., Ex. 1 (FTC June 18, 2024 Letter) at 2; *Luken v. Christensen Grp. Inc.*, 2018 WL 1994121, at *2 (W.D. Wash. Apr. 27, 2018) (Rule 30(b)(6) "does not extend to burdening the responding parties with production and preparation of a witness on every facet of the litigation").[3] For example, Defendants' topics included the entirety of the FTC's investigation; the entirety of the FTC's allegations that Amazon failed to provide simple mechanisms to cancel Prime, failed to obtain consumers' express informed consent to Prime enrollment, and failed to clearly and conspicuously disclose Prime's material terms; and many other topics covering every aspect of the litigation. *See* Nardini Decl., Ex. 1 at 2. Moreover, the notice sought testimony regarding broad subject areas with little or no relevance to any claim or defense, such as all lawsuits against any individual defendant "at a company alleged to have violated the law" or in which the FTC has "purported to prosecute the use of Dark Patterns or misuse of Negative Options." *See id.* at 2-3. Initially, Defendants refused to meaningfully modify the topics. *See* Dkt. #215-1 (FTC's July 19, 2024 Letter) at 1-2.

After significant negotiation, Defendants ultimately agreed to somewhat narrow the deposition topics. The FTC agreed to provide 8.5 hours of testimony (significantly more than

[3] Notably, Defendants did not comply with Rule 30(b)(6)'s meet and confer requirements either before or promptly after serving this wide-ranging notice. *See* Nardini Decl., Ex. 1 at 1.

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the presumptive 7 hours permitted by the Federal Rules) on 20 broad topics, such as: "The reasons why the FTC believes the Prime Online Cancellation Flow does not provide a simple mechanism for a consumer to stop recurring charges for Prime"; "All materials that [the FTC] contend[s] provide fair notice that the Prime Online Cancellation Flow violates ROSCA, including lawsuits, enforcement actions, court rulings, guidance, policy statements, or statutory or regulatory text"; "The reasons why the FTC believes that the Prime Enrollment Flow does not obtain consumers' express informed consent before charging the consumer"; "The reasons why the FTC believes that Neil Lindsay, Jamil Ghani, and Russell Grandinetti participated in or controlled Amazon's allegedly unlawful conduct"; and many others. *See* Nardini Decl., Ex. 2.

The parties also agreed to exclude from the Rule 30(b)(6) deposition certain topics related to the Negative Option Rule rulemaking, to which the FTC had repeatedly objected as irrelevant to this litigation. *See, e.g.*, Dkt. #215-1 at 3-4. Nonetheless, during the deposition, Amazon counsel improperly sought testimony regarding the topics the parties agreed to exclude. *See* Dkt. #215-3 (FTC's Nov. 12, 2024 Letter) at 4; Dkt. #215-7 (Basta 30(b)(6) Dep.) at 180-195, 440-441.

Following the Rule 30(b)(6) deposition, Defendants sought even more testimony from the FTC, regarding the FTC's public statements about ROSCA during the Negative Option Rule rulemaking. In rejecting Defendants' request, the FTC repeatedly emphasized this testimony would be irrelevant to any claim or defense in the case. *See, e.g.*, Dkt. #215-3. Defendants now move to compel the FTC's testimony on the Rulemaking Topics.

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ARGUMENT

Although the scope of discovery is generally permissive, the Federal Rules "mandate reasonable limits on discovery through increased reliance on the common-sense concept of proportionality designed to provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery." *Alvarado-Herrera v. Acuity*, 344 F.R.D. 103, 106 (D. Nev. 2023), *aff'd sub nom. Alvarado-Herrera v. Acuity A Mut. Ins. Co.*, 2023 WL 5035323 (D. Nev. Aug. 4, 2023) (citation omitted). Thus, "[d]istrict courts possess wide discretion to determine what constitutes a showing of good cause and to fashion a protective order that provides the appropriate degree of protection." *Id.* (citation omitted). Moreover, "[c]ourts have not hesitated to issue protective orders when [parties] are asked to respond to overly broad or unfocused Rule 30(b)(6) deposition notices." *Id.* (citation omitted). Indeed, "the court has an obligation to prevent a party from using a Rule 30(b)(6) deposition to harass the opposing party or to subject the opposing party to unreasonably burdensome or cumulative discovery." *Corker v. Costco Wholesale Corp.*, 2022 WL 92979, at *2 (W.D. Wash. Jan. 10, 2022).

I. Testimony Regarding the FTC's Statements About ROSCA Is Irrelevant

This Court has already properly ruled that the FTC's Negative Option Rule rulemaking is irrelevant to the merits of this case. *See* Dkt. #180 at 11 (holding the FTC's "later rulemaking . . . is not at issue in this case"); *see also* Dkt. #165 at 44-45 (rejecting Defendants' assertion the "FTC's notice of proposed rulemaking" was relevant to their vagueness arguments). Likewise, the Court held the FTC's interpretation of ROSCA is irrelevant. *See* Dkt. #180 at 12 ("[T]he FTC's interpretation of ROSCA is irrelevant to the Court's interpretation of the statute."); *see also FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 251 (3d Cir. 2015) ("[T]he

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court, not the agency, is the ultimate arbiter of the statute's meaning."). Notwithstanding the Court's repeated, clear holdings, Defendants insist they are entitled to testimony from the FTC regarding (1) the FTC's view whether ROSCA and the Negative Option Rule are "inconsistent" or "different" and (2) the FTC's "public statements" regarding ROSCA. *See* Motion at 9-10. For the reasons explained below, Defendants are incorrect.

A. The Rulemaking Topics Seek Irrelevant Testimony on the FTC's Interpretation of ROSCA

As an initial matter, although Defendants assert "the Rulemaking Topics all concern the FTC's public statements about the subject matter of this lawsuit," Motion at 11, they do not meaningfully develop this assertion. *See Christian Legal Soc. Chapter of Univ. of California v. Wu*, 626 F.3d 483, 487 (9th Cir. 2010) (holding courts regularly "refuse[] to address claims that were only argue[d] in passing") (citation omitted). Defendants' failure to do so is unsurprising because the Rulemaking Topics on their face make clear Defendants seek irrelevant testimony.

First, Topic 30 seeks testimony on "[w]hether and to what extent the requirements promulgated in the rulemaking are inconsistent with or different from the requirements the FTC has asserted under ROSCA in this case." Motion at 9. However, whether the Negative Option Rule imposes requirements "different" from ROSCA's requirements is irrelevant to any claim or defense. This is true for the straightforward reason that the FTC is enforcing ROSCA (not the Rule). *See* Dkt. #180 at 11. The fact the FTC has promulgated a new rule says nothing about ROSCA's existing requirements. *See* Dkt. #165 at 43 ("[There are no controlling regulations or policy statements that reflect an official, prior interpretation of ROSCA.").

Even if Defendants were correct that differences between the Negative Option Rule and ROSCA were relevant (which, as the Court's prior holdings reflect, they are not), that comparison can be done on the face of the Rule and statute. Moreover, any public statement

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made by the FTC is just that—public and therefore accessible. The FTC's internal views and deliberations about the differences and similarities between the Rule and ROSCA could not possibly be relevant in this litigation. *See* Dkt. #180 at 8-9, 12. Further, requiring the FTC to provide such testimony would impose the considerable burden of preparing a witness on the Rulemaking Topics.

Moreover, FTC testimony comparing ROSCA and the Negative Option Rule would be an inappropriate use of a Rule 30(b)(6) deposition, the purpose of which is to discover *facts*, not the FTC's legal interpretations of the various statutes and regulations it enforces. Permitting Defendants to question the FTC on its legal interpretations would inevitably invade the FTC's attorney-client privilege, work product protection, deliberative process privilege, or other applicable privileges, leading to further unnecessary litigation. *See, e.g.*, *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y. 2002) ("In a nutshell, depositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories . . . .").

In support of Topic 30's purported relevance, Defendants assert "the FTC has made multiple public statements contrasting the Rule to 'existing law.'" Motion at 9-10. But again, the FTC's statements are not relevant to the Court's interpretation of ROSCA. *See* Dkt. #180 at 12; *Wyndham Worldwide Corp.*, 799 F.3d at 251. In any case, as a practical matter, there is nothing further for Defendants to "discover" with respect to these statements, which are generally straightforward assertions. *See, e.g.*, Dkt. #215-5 (Negative Option Rule) (hereafter

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"Rule") Rule at 152-53 ("Existing law already requires sellers not to make misrepresentations.").[4]

Likewise, Defendants claim Topics 32 and 33 seek testimony concerning "[t]he factual support for and meaning of the FTC's public statements about ROSCA" in the 2019 Advance Notice of Proposed Rulemaking ("ANPR"), *see* 84 Fed. Reg. 52393, and 2023 Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule"), *see* 88 Fed. Reg. 24716. Motion at 10. However, the FTC's "statements about ROSCA" during the rulemaking—and FTC testimony regarding such statements—are even further removed from the Court's interpretation of the statute. *See* Dkt. #165 at 43 (holding "there are no controlling regulations or policy statements that reflect an official, prior interpretation of ROSCA"); Dkt. #180 at 12. Moreover, even if the statements themselves were relevant to Defendants' purported defenses, *see infra* Sections III & IV, the "factual support" or the FTC's view of the "meaning of" these statements would be irrelevant, because all that could conceivably be relevant to Defendants' knowledge or fair notice would be the public statements themselves.

For several additional reasons, Defendants are not entitled to discovery into the "factual support" for these statements. First, many of the "statements" for which Defendants seek "factual support" are legal interpretations that describe or characterize the text of ROSCA. *See, e.g.*, Motion at 10 (ROSCA "provides no details regarding steps marketers must follow to comply with [ROSCA's] provisions") (quoting 84 Fed. Reg. at 52395); *id.* (ROSCA does not "specify what methods would satisfy [ROSCA's cancellation] requirement.") (quoting 84 Fed.

[4] Defendants further assert these statements have been "inconsistent" throughout the rulemaking. *See* Motion at 10. That is incorrect, but regardless, the statements' purported inconsistency does not magically confer relevance on otherwise irrelevant subjects.

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Reg. at 52396). The "basis" for the statements is simply the ROSCA statute itself—there are no underlying "facts" for Defendants to discover.[5]

Second, other "statements" merely relay third-party comments. For instance, Defendants assert the NPRM "highlighted the views expressed by a group of 23 state attorneys" with respect to ROSCA. Motion at 5; *see also* 88 Fed. Reg. at 24723 (noting "[s]everal commenters" discussed the "existing requirements" including "the State AGs"); *infra* Section I.B. These third-party comments may or may not possess "factual support," but obviously the FTC would have no further knowledge beyond the comments themselves—which, notably, the FTC has already produced to Defendants and, in any event, are publicly available.[6]

Third, to the extent Defendants point to a limited number of statements for which the FTC could at least theoretically provide "factual support," these, at most, reflect industry-wide generalizations unrelated to the facts of this case, and so discovery regarding such statements would be completely irrelevant. *See, e.g.*, Rule at 164 ("[B]ased on the Commission's experience . . . the average time for consumers to read required disclosures and provide consent to a negative option plan online is 30 seconds to one minute.") (*see* Motion at 13). Even if it were the case that such comments had any attenuated relevance to Defendants' conduct, they do not justify the burden concomitant with preparing for a witness to testify on the Rulemaking Topics. *See* Fed. R. Civ. P. 26(b)(1) (discovery must be proportional to the needs of the case).

[5] To the extent Defendants seek the FTC's testimony to explain the "meaning of" the FTC's statements about the law or how the FTC has interpreted and applied ROSCA to the "facts of this case," that information is privileged. *See U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 WL 3537070, at *4 (M.D. Fla. Aug. 14, 2012) (rejecting topics requiring the government "to disclose how they have interpreted and applied the law and government policies to the facts of this case" because "[t]his information is opinion work product . . . protected by the work product privilege").

[6] Without conceding relevance, the FTC has also produced to Defendants other non-privileged communications between the FTC and third parties relating to ROSCA, negative options, and "dark patterns." *See* Dkt. #148 at 2.

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B. There Are No "Statements" Regarding Defendants on Which to Take Testimony

Defendants also assert they "must be permitted to explore the statements made about them, including . . . the FTC's inclusion of the Prime cancellation flow to calculate the average time for a 'ROSCA-compliant cancellation' method" in the Negative Option Rule. Motion at 11-12. As an initial matter, "statements made about [Defendants]" in the final Negative Option Rule is not a noticed topic. *See* Motion at 9-10. But even if they were properly noticed, there is no relevant testimony to take regarding these purported "statements." Specifically, what Defendants refer to as "statements" are actually references to a public, third-party study entitled "How Companies Make It Difficult to Unsubscribe." *See* Rule at 166 n.544.[7] The study involved signing up for 16 online subscriptions (including Amazon Prime), cancelling each one, and recording the time it took to cancel as well as obstacles faced in canceling. *See id.* at 166. The Rule cites this study "to estimate the average time for online cancellations," as a component of the statutorily required section analyzing the Rule's "projected benefits" or other effects. *See id.* at 158, 166; *see also id.* at 192 n.601 (noting the Commission had located subscriber estimates for seven of the 16 firms included in the research, and that "[t]he number of U.S. subscribers to Amazon Prime is estimated to reach 171.8 million in 2024"). Any analysis or discussion of the study beyond what is stated in the Rule itself is both irrelevant and protected by the attorney client privilege, deliberative process privilege, or other applicable privilege.

Other so-called "statements" about Defendants in the Rule are merely citations to decisions in this matter or third-party comments. *See, e.g.*, Rule at 8 & n.10 (citing this matter as one of several examples of recent FTC cases "challenging harmful negative option practices");

[7] The study is publicly available at https://pudding.cool/2023/05/dark-patterns/ (last accessed Jan. 15, 2024).

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id. at 110 n.374 (Individual commenter: "I had to navigate an endless labyrinth of dark-patterned links in order to cancel an Amazon Prime subscription that took me one click to sign up for."). The Defendants are already well-aware of the Court's orders in this matter, and the FTC has already produced all third-party comments (including those cited in the Rule). The FTC's non-public discussions regarding the Court's orders or third-party comments are simply irrelevant to any claim or defense in this case. Moreover, any testimony the FTC could possibly offer beyond the plain language of these orders or third-party statements would likewise be privileged.

Defendants' cases are easily distinguishable. In those cases, unlike here, a party sought discovery of specific factual information relevant to the conduct at issue, not the parties' interpretation of legal concepts. *See Ressler v. United States*, 2012 WL 3231002, at *3 (D. Colo. Aug. 6, 2012) (permitting discovery of "factual information gathered by the FAA responsive to the question of whether to provide pilots with maximum wind gusts" relevant to plaintiff's allegations FAA was negligent when it failed to provide airplane pilots proper wind information); *Chambers v. Cap. Cities/ABC*, 159 F.R.D. 429, 430-31 (S.D.N.Y. 1995) (in an age discrimination case, permitting discovery regarding "press statements by executives of defendants" which plaintiff asserted "tend to show age discrimination" by defendants); *United States v. Holland*, 2017 WL 1354178, at *6 (E.D. Mich. Apr. 13, 2017) (in a tax collection case, permitting discovery regarding certain federal tax lien release certificates relevant to specific factual issue: whether defendant's "existing tax liens were satisfied"). In contrast, Defendants seek discovery regarding the FTC's public statements about ROSCA, which are irrelevant to whether Defendants' conduct violated ROSCA.

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II. Defendants Cannot Use Testimony Regarding the FTC's Statements About ROSCA to "Impeach" the FTC's Case

Defendants assert the FTC's public statements about ROSCA are "relevant for impeachment" because Defendants claim the FTC has "taken positions in this case that contradict the FTC's official positions as reflected in public rulemaking." Motion at 12. However, Defendants cannot take deposition testimony regarding the FTC's statements about ROSCA to "impeach" the FTC's legal positions in this case. *See* Dkt. #180 at 5-6 (rejecting Defendants' request for discovery of "internal agency discussions" of ROSCA to "impeach" the "FTC's interpretation of ROSCA"); *JPMorgan Chase Bank*, 209 F.R.D. at 362 ("[D]epositions . . . are designed to discover facts, not . . . legal theories").

Indeed, Defendants concede the Court previously rejected Defendants' request for "internal agency discussions" of ROSCA, which Defendants claimed were relevant to "contradict the FTC's litigation theories." Dkt. #180 at 5. The Court correctly reasoned "the theory of the case that Defendants wish to 'impeach or contradict' is the FTC's interpretation of ROSCA in this litigation." *Id.* at 6. The Court found that this was an improper use of discovery precisely because "[t]he Court interprets the statute using the tools of statutory construction" and the materials Defendants sought "have no legal significance" for this purpose. *Id.*; *see also Wyndham Worldwide Corp.*, 799 F.3d at 251. The same is true for the testimony Defendants seek now, and Defendants have offered no basis for the Court to revisit its prior ruling in this regard.[8] Moreover, to be clear, the FTC will not offer testimony from any witnesses (or other

[8] Defendants attempt to distinguish the Court's prior ruling by asserting that because the "Rulemaking Topics target the FTC's 'official, public statements'" and "official agency positions" they are purportedly "fair game for discovery." Motion at 13. As an initial matter, the Court has already held "there are no controlling regulations or policy statements that reflect an official, prior interpretation of ROSCA." Dkt. #165 at 43. Moreover, Defendants do not seek the FTC's public statements which, obviously, are public but rather *testimony* regarding these

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"evidence" obtained in discovery) about the meaning of the law, for the same reason Defendants should not able to obtain discovery on the meaning of the law: it is completely irrelevant to the Court's interpretation of ROSCA. Thus, there is nothing to "impeach."[9]

Moreover, Defendants' assertion the "FTC has taken positions in this case that contradict the FTC's official positions as reflected in public rulemaking" is a red herring. *See* Motion at 12. Defendants' purported "examples," tellingly, do not demonstrate any contradictory FTC positions.

First, Defendants highlight testimony from the 30(b)(6) deposition of FTC designee Amanda Basta, in which Ms. Basta testified she "disagree[d]" with the statements in the 2019 ANPR and 2023 Proposed Rule that "the current framework does not provide clarity about how to avoid deceptive negative option disclosures and procedures." Motion at 12; Dkt. #215-7 at 181:6-13. However, as Defendants are fully aware, the rulemaking was not a noticed topic for the 30(b)(6) deposition, therefore Ms. Basta explicitly offered this testimony in her personal capacity, not as the FTC designee.[10] *See* Motion at 9 (conceding the parties proceeded with the 30(b)(6) deposition while holding the "rulemaking" topics "in abeyance"); *see also* Dkt. #215-7 at 440:14-441:11 (Ms. Basta testifying she was "not the designee for the Commission" on the rulemaking). Thus, this "example" presents no contradictory FTC positions.

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statements. Defendants also assert they seek "facts, not legal interpretations." Motion at 13. But as explained above, the FTC's public statements are not relevant to the Court's interpretation of ROSCA, and there are no relevant facts to discover from the FTC. *See supra* Section I.A.

[9] Defendants cite *SEC v. Goldstone*, but that case is inapposite because it did not permit defendants to take discovery to "impeach" the government's interpretation of the law. Rather, the court permitted defendant to take discovery on an issue of fact—the predictability of the "downturn in the credit or repurchase agreement markets." *SEC v. Goldstone*, 2014 WL 4349507, at *40 (D.N.M. Aug. 23, 2014).

[10] The referenced statement with which Ms. Basta, testifying in her personal capacity, disagreed merely reflects the statutory text of ROSCA itself: "the current framework does not provide clarity about how to avoid deceptive negative option disclosures and procedures. For example, ROSCA lacks specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures." 84 Fed. Reg. at 52396.

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Second, Defendants point out that in this litigation the FTC objected to Defendants' characterization that "the FTC agrees that attempts to retain consumers by offering them deals just prior to, rather than just after, cancellation is 'pro-consumer.'" Motion at 12. Defendants argue this objection contradicts an earlier "FTC" statement. However, as the FTC previously explained, the FTC statement that is supposedly contradicted is, in fact, a concurring statement by a single former Commissioner, not a position of the Commission. *See* Dkt. #125 at 37 n.23; 16 CFR § 4.14(c) ("Any Commission action . . . may be taken only with the affirmative concurrence of a majority of the participating Commissioners"). Moreover, whether the FTC considers an action pro- or anti-consumer is not relevant to whether Defendants in this case broke the law. The law is what it is, no more or less.

III. The Rule 30(b)(6) Testimony Is Irrelevant to the FTC's Civil Penalties Demand

The Court previously rejected Defendants' facially flawed argument the FTC's "internal discussions about ROSCA" were relevant to show Defendants lacked "actual knowledge" of the ROSCA violations, and thus could not be held liable for civil penalties. *See* Dkt. #180 at 6. In particular, the Court held "the FTC's internal interpretations of ROSCA, negative options, and dark patterns over time has no bearing on the objective reasonableness of Defendants' interpretation of ROSCA." Dkt. #180 at 8-9. In so holding, the Court found persuasive the reasoning of *United States v. Wisconsin Bell, Inc.*: "[i]nternal agency communications and internal agency interpretations of a rule cannot be relevant to whether the defendant knowingly violated the rule unless the defendant was aware of those internal communications and interpretations at the time the rule was violated." *Id.* at 8 (quoting *Wisconsin Bell, Inc.*, 2020 WL 13048895, at *2 (E.D. Wis. Oct. 29, 2020)).

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The same logic applies here. Only information actually known to Defendants at the time of their violative conduct is potentially relevant to whether they had "actual knowledge." Notwithstanding the Court's clear ruling, Defendants dubiously claim their request for FTC testimony is "[c]onsistent with the Court's prior reasoning." *See* Motion at 15. In fact, Defendants could not have known the contents of any Rule 30(b)(6) testimony the FTC had yet to provide or about "controlling . . . policy statements" that—as the Court has recognized—did not exist, when Defendants violated the law. *See* Dkt. #165 at 43. FTC testimony on such topics is, therefore, irrelevant to Defendants "actual knowledge" or their civil penalties defense. *See, e.g.*, *Wisconsin Bell, Inc.*, 2020 WL 13048895, at *2 ("Only information available to Wisconsin Bell at the time of the alleged violation is relevant to whether the alleged violation was 'knowing.'"); *SEC v. BankAtlantic Bancorp, Inc.*, 285 F.R.D. 661, 668 (S.D. Fla. 2012) ("[T]he SEC's internal policies and investigations of other entities have no bearing on the issue of scienter.").

Defendants' other derivative arguments regarding civil penalties therefore all fail as well. First, Defendants assert certain "[s]tatements regarding regulatory confusion . . . go to the core of Defendants' civil penalties argument." Motion at 15. As explained repeatedly above, even if the statements themselves were relevant (which they are not), testimony regarding these statements is irrelevant to Defendants' "actual knowledge" at the time of the violation both because the testimony itself only occurred later in time (i.e., after the case began), and because any internal FTC views were never communicated to Defendants. Moreover, also as noted above, such discussions are privileged.

Defendants cite two cases in support of their position, but both are distinguishable because neither held a party may conduct further discovery into the government's public

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statements to support an actual knowledge defense. *See United States v. Anzalone*, 766 F.2d 676, 681-82 (1st Cir. 1985) (reversing defendant's *criminal* conviction because a public government report acknowledged the regulations under which defendant was convicted were silent as to defendant's conduct); *United States v. AMC Ent., Inc.*, 549 F.3d 760, 769 (9th Cir. 2008) (declining to enforce injunction requiring movie theaters to comply with certain ADA "line of sight" requirements because there was a "circuit split" on the meaning and the government did not clarify the regulation despite publicly representing it would).[11]

Second, Defendants incorrectly assert "the FTC repeatedly attempted to explain what ROSCA's existing provisions do and do not require." Motion at 15. Again, as the Court previously found, Defendants claim is not true. *See* Dkt. #165 at 43. However, even if it were, the only evidence that could be relevant to Defendants' civil penalties defense would be the public statements themselves, not any testimony regarding what the Commission meant, which would invade various of the Commission's privileges and upon which Defendants could not have relied.

Third, Defendants assert the FTC "seeks to hold Defendants liable for violating multiple legal requirements that were clarified through the rulemaking completed years *after* the conduct at issue." Motion at 16. This is patently incorrect, and Defendants do not demonstrate otherwise. The FTC seeks to enforce ROSCA not the new Negative Option Rule, which largely does not even take effect until May 2025. *See* 89 Fed. Reg. at 90476. As the Court held, what ROSCA requires is a legal issue for the court. *See* Dkt. #180 at 12. This inquiry cannot be informed by a rulemaking, which occurred over a decade after the statute's enactment.

[11] Unlike the ADA regulation in *United States v. AMC Entertainment*, there is no similar Circuit split regarding the meaning of ROSCA. Indeed, as the Court noted previously, "there is plenty of caselaw interpreting similar provisions" to ROSCA. Dkt. #165 at 43.

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Moreover, the fact that some of the new Rule may overlap with some of ROSCA is equally irrelevant. For example, Defendants cite the FTC's assertion that the "Complaint more than plausibly alleges consumers would not readily notice and understand three material terms of the Prime enrollment transaction" for the proposition that the FTC is imposing a "new" requirement enshrined in the Negative Option Rule. Motion at 7 & n.3 (quoting Dkt. #125 at 4). However, the idea that "clear and conspicuous" disclosures must be "readily noticeable" long predates the Rule. *See, e.g.*, *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1091 (9th Cir. 2020) (holding "clear" means "reasonably understandable," and "conspicuous" means "readily noticeable to the consumer."). [12]

Finally, Defendants cite *United States v. Rahm* for the proposition that they have a right to present "circumstantial evidence" of their lack of knowledge. 993 F.2d 1405, 1414 (9th Cir. 1993). However, *Rahm* is also readily distinguishable. *Rahm* was a criminal case in which the prosecution's "proof of knowledge was entirely circumstantial"—specifically, "the prosecution asked the jury to *infer*" defendant knew certain $100 bills were counterfeit based on defendant's "possession of the . . . bills and her attempt to use one of them"—but the government simultaneously sought "to deny Rahm the right to . . . present her own inferential argument—that [her] perceptual difficulties, coupled with her remaining in the store for fifteen minutes, should lead the jury to infer that she *did not know* the money was counterfeit." *Id.* The court rejected the government's attempt at this "unfair advantage." *Id.* That is entirely different from circumstances here, in which the FTC is not opposing Defendants' attempts to proffer their own

[12] Defendants assert "the FTC did not dispute that the requirements it seeks to enforce here are substantively identical to requirements proposed in the rulemaking." Motion at 5-6 (citing Dkt. #148 (FTC Opp. MTC) at 15 (ECF Header)). Defendants' characterization is inaccurate and their citation to the FTC's Opposition does not support it. The FTC has been clear all along that it is enforcing ROSCA's existing requirements, not the Negative Option Rule.

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evidence in a criminal proceeding, but rather prevent Defendants from seeking irrelevant testimony from the FTC.

IV. The Testimony Defendants Seek Is Not Relevant to Defendants' Due Process Defense

Defendants concede that, at the motion to dismiss stage, the Court rejected Defendants' due process arguments. *See* Motion at 17. However, Defendants assert they "have now pleaded a traditional as-applied challenge to ROSCA." *Id.*

As an initial matter, Defendants already made (and the Court already rejected) an as-applied challenge to ROSCA, a statute they concede "is facially clear." Dkt. #131 (Amazon Reply ISO Motion to Dismiss) at 23; *see also* Dkt. #130 (Individual Defendants' Reply ISO Motion to Dismiss) at 4 ("This case violates due process for the reasons discussed in Amazon's briefs"). Indeed, an as-applied challenge "challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance." *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011); *see also Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203 (9th Cir. 2022) ("An as-applied challenge . . . focuses on the statute's application to the plaintiff, and requires the court to only assess the circumstances of the case at hand.") (citation omitted). In the Motion to Dismiss, Amazon argued "the ***FTC's enforcement here*** would . . . violate Amazon's due process rights." Dkt. #85 (Motion to Dismiss) at 24; *see also id.* (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012), for the proposition: "finding agency enforcement unconstitutional due to lack of 'fair notice,' even 'leaving aside any concerns about facial invalidity'"). Thus, Defendants have already asserted that they, in particular, lacked "fair notice" of enforcement of ROSCA against them in these "specific factual circumstances." The Court rejected this argument. *See* Dkt. #165 at 43.

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In any case, the Rulemaking Topics are irrelevant to Defendants' due process defense. As the Court previously held, laws imposing civil penalties must "provide a person of ordinary intelligence fair notice of what is prohibited." Dkt. #180 at 9 (quoting *Fox Television Stations, Inc.*, 567 U.S. at 253). However, "regulated parties have no access to an agency's internal deliberations; thus these communications should have no bearing upon whether the agency has given fair notice." *Id.* (quoting *Exxon Mobil Corp. v. Mnuchin*, 430 F. Supp. 3d 220, 235 (N.D. Tex. 2019)). Therefore, the Court concluded, "internal agency interpretations are also not relevant to whether a 'person of ordinary intelligence' . . . would have fair notice of what ROSCA prohibits." *Id.* at 10. For the same reason, as with Defendants' civil penalties argument, testimony on the Rulemaking Topics is irrelevant to Defendants' fair notice argument because Defendants had "no access" to this information. Moreover, Defendants already had ample opportunity to take, and in fact did take, Rule 30(b)(6) testimony on several noticed topics relating to "fair notice." *See* Nardini Decl., Ex. 2 at 1 (listing Rule 30(b)(6) deposition to include "[a]ll materials that you contend provide fair notice that" the "Prime Online Cancellation Flow" and "Prime Enrollment Flow" "violate[] ROSCA or Section 5" and "[a]ll materials you contend provide fair notice to Neil Lindsay, Jamil Ghani, and Russell Grandinetti that they may be liable for violating ROSCA or Section 5"); Nardini Decl., Ex. 3 (Basta 30(b)(6) Dep.) at 290:01-295:20 (testifying "the text of the statute itself" provided Defendants with "fair notice"). Defendants are not entitled to even further testimony merely because they were not happy with the FTC's answers, nor should the FTC be burdened with preparing and sitting for yet another deposition on irrelevant topics.

Furthermore, Defendants utterly fail to explain why ROSCA is purportedly unconstitutionally vague as applied to them, or why they purportedly lacked fair notice of the

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ROSCA's requirements. *See, e.g.*, *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (holding an as-applied challenge contends a law's "application to a particular person under particular circumstances deprived that person of a constitutional right."). Instead, as they unsuccessfully attempted in the Motion to Dismiss, Defendants challenge the *FTC's enforcement* of the statute against them on vagueness and fair notice grounds. *See* Dkt. #171 (Defendants' Answer) at 66 (Unconstitutional Vagueness) ("Applying ROSCA here to prohibit Defendants' alleged conduct violates the Due Process Clause" because "the Amended Complaint asserts novel 'dark patterns'-based theories of liability"); *id.* at 66-67 (Lack of Fair Notice) ("[T]he FTC failed to provide fair notice that Defendants' alleged conduct violated the law."). However, in a case such as this, which "involves ordinary judicial interpretation of a civil statute," the "relevant question is not whether [Defendants] had fair notice of the *FTC's interpretation* of the statute, but whether [Defendants] had fair notice of what the *statute itself* requires." *Wyndham Worldwide Corp.*, 799 F.3d at 253-54; *see also* Dkt. #165 at 43 (same). Defendants cannot justify further discovery based on defenses it has not actually pleaded.

Defendants' remaining arguments all fail as well. First, Defendants argue the fact the FTC conducted "notice-and-comment rulemaking is relevant to showing that ROSCA did not already provide sufficient notice." Motion at 18. However, the Court has already rejected this argument. *See* Dkt. #165 at 45 (rejecting Defendants' argument that "because the FTC is working on promulgating regulations under ROSCA, it has effectively admitted that the statute is vague, and noting Defendants' admission that "ROSCA is 'facially clear'") (citation omitted).

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Indeed, the fact that the FTC has promulgated a new rule says nothing about ROSCA's existing requirements.[13]

Second, Defendants assert the FTC's statements about ROSCA "demonstrate the potential for 'arbitrary' and 'discriminatory' enforcement." Motion at 18. As an initial matter, Defendants make no argument for "arbitrary enforcement" against them, and the Court has likewise already rejected this argument. *See* Dkt. #165 at 44 (rejecting Defendants' argument that the FTC singled them out for "unprecedented sanction" and noting the fact "the FTC has not brought civil actions against all individuals who the Defendants argue engage in similar practices does not mean that this enforcement action violates the individual defendants' rights to due process"). Regardless, Defendants' assertion does not justify additional discovery. Even if relevant to an "arbitrary enforcement" argument, the statements are public and speak for themselves.

Third, Defendants assert the FTC's statements "evince conflicting views about ROSCA at the FTC," Motion at 18, but as previously explained there is no such conflict, *see supra* Section II.[14]

[13] Defendants' cases are inapposite because neither holds subsequent rulemaking is relevant to showing lack of fair notice of a pre-existing statute. *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981) (setting aside FTC administrative order requiring a secured creditor to credit debtor with the "best possible" value of a "repossessed vehicle" because under applicable administrative requirements the "matter should be addressed by rulemaking"); *United States v. Exxon Corp.*, 87 F.R.D. 624, 633 (D.D.C. 1980) (permitting "contemporaneous construction evidence" where DOE attempted to "enforce, retrospectively, new regulations").

[14] Even if there were such a conflict, Defendants cases are readily distinguishable. *See, e.g.*, *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155-56 (9th Cir. 2014) (holding Los Angeles criminal ordinance prohibiting use of a vehicle "as living quarters either overnight, day-by-day, or otherwise" was vague "on its face" because the language of the statute "fails to draw a clear line between innocent and criminal conduct"); *Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940, 943 (9th Cir. 1979) (holding "it is far from clear from the natural and plain meaning of its words" of the regulation at issue that plaintiff's conduct fell within the meaning of the regulation).

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CONCLUSION

For the foregoing reasons, the FTC respectfully requests the Court deny Defendants' Motion to Compel, Dkt. #214.

LOCAL RULE 7(e) CERTIFICATION

I certify that this memorandum contains 6,627 words, in compliance with the Court's December 9, 2024 Order (Dkt. #207) and Local Rule 7(f)(4).

Dated: January 15, 2025

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